

In re: RUFINA ACEVEDO PEREZ.

P.Q. Docket No. 01-0017.

Order Affirming Decision.

Filed November 28, 2001.

P.Q. – Default – Failure to file timely answer – Importation of, Mangoes – Cherries – Limes – Civil penalty – Installment payments.

The Judicial Officer (JO) affirmed the Default Decision issued by Administrative Law Judge Dorothea A. Baker (ALJ): (1) concluding that Respondent imported approximately 36 fresh mangoes from Mexico into the United States in violation of 7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, and .56-3; (2) concluding that Respondent imported approximately 2 pounds of cherries from Mexico into the United States in violation of 7 C.F.R. §§ 319.56(c) and .56-3; (3) concluding that Respondent imported one fresh sweet lime from Mexico into the United States in violation of 7 C.F.R. § 319.56(c); and (4) assessing Respondent a \$500 civil penalty. At Respondent's request, the JO provided for the payment of the civil penalty in installments of \$50 per month.

James A. Booth, for Complainant.

Respondent, Pro se.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on May 23, 2001. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 319.56-.56-8); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about May 20, 2000, Rufina Acevedo Perez [hereinafter Respondent] imported approximately 36 fresh mangoes from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, and .56-3 because the mangoes were not imported under permit and treated, as required; (2) on or about May 20, 2000, Respondent imported approximately 2 pounds of fresh cherries from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2x, and .56-3 because the cherries were not imported under permit and treated, as required; and (3) on or about May 20, 2000, Respondent imported one fresh sweet lime from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. § 319.56(c) because the importation of fresh sweet lime from Mexico is prohibited (Compl. ¶¶ II-VI).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice,

and a service letter on May 29, 2001.¹ Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On June 21, 2001, the Hearing Clerk sent Respondent a letter informing Respondent that Respondent's answer to the Complaint had not been received within the allotted time.²

On July 25, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Default Decision and Order" [hereinafter Motion for Adoption of Proposed Decision and Order] and a "Proposed Default Decision and Order" [hereinafter Proposed Decision and Order]. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and a service letter on July 30, 2001.³ Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Respondent a letter dated August 22, 2001, stating that objections to Complainant's Motion for Adoption of Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration and decision.⁴

On August 27, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a Default Decision and Order [hereinafter Initial Decision and Order]: (1) finding that on or about May 20, 2000, Respondent imported approximately 36 fresh mangoes from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, and .56-3; (2) finding that on or about May 20, 2000, Respondent imported approximately 2 pounds of fresh cherries from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. §§ 319.56(c) and .56-3; (3) finding that on or about May 20, 2000, Respondent imported one fresh sweet lime from Mexico into the United States at Dallas, Texas, in violation of 7 C.F.R. § 319.56(c); (4) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. § 319.56 *et seq.*; and (5) assessing Respondent a \$500 civil penalty (Initial Decision and Order at 2).

On September 24, 2001, Respondent appealed to the Judicial Officer. On November 20, 2001, Complainant filed "Complainant's Response to Respondent's

¹ See Domestic Return Receipt for Article Number 70993400001445790235.

² See letter dated June 21, 2001, from Joyce A. Dawson, Hearing Clerk, to Rufina Acevedo Perez.

³ See Domestic Return Receipt for Article Number 7099 3400 0014 4579 0211.

⁴ See letter dated August 22, 2001, from Joyce A. Dawson, Hearing Clerk, to Rufina Acevedo Perez.

Appeal.” On November 27, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ’s Initial Decision and Order, except that I issue an Order that provides for Respondent’s payment of the civil penalty in installments. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order, with minor modifications. Additional conclusions by the Judicial Officer follow the ALJ’s conclusion of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 7B—PLANT PESTS

....

§ 150gg. Violations

....

(b) Civil penalty

Any person who—
(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

....

may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

....

CHAPTER 8—NURSERY STOCK AND OTHER PLANTS AND PLANT PRODUCTS

....

**§ 163. Violations; forgery, alterations, etc., of certificates; punishment;
civil penalty**

. . . Any person who violates any . . . rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] . . . may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150gg(b), 163.

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT
OF AGRICULTURE**

....

**CHAPTER III—ANIMAL AND PLANT HEALTH
INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

....

PART 319—FOREIGN QUARANTINE NOTICES

....

SUBPART—FRUITS AND VEGETABLES

QUARANTINE

§ 319.56 Notice of quarantine.

....

(c) On and after November 1, 1923, and until further notice, the importation from all foreign countries and localities into the United States

of fruits and vegetables, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables, except as provided in the rules and regulations supplemental hereto, is prohibited: *Provided*, That whenever the Deputy Administrator for the Plant Protection and Quarantine Programs shall find that existing conditions as to pest risk involved in the importation of the articles to which the regulations supplemental hereto apply, make it safe to modify, by making less stringent, the restrictions contained in any of such regulations, he shall publish such findings in administrative instructions, specifying the manner in which the regulations shall be made less stringent, whereupon such modification shall become effective; or he may, when the public interests will permit, with respect to the importation of such articles into Guam, upon request in specific cases, authorize such importation under conditions, specified in the permit to carry out the purposes of this subpart, that are less stringent than those contained in the regulations.

. . . .

§ 319.56-2i Administrative instructions prescribing treatments for mangoes from Central America, South America, and the West Indies.

(a) *Authorized treatments.* Treatment with an authorized treatment listed in the Plant Protection and Quarantine Treatment Manual will meet the treatment requirements imposed under § 319.56-2 as a condition for the importation into the United States of mangoes from Central America, South America, and the West Indies. The Plant Protection and Quarantine Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter, “Materials incorporated by reference.”

(b) *Department not responsible for damage.* The treatments for mangoes prescribed in the Plant Protection and Quarantine Treatment Manual are judged from experimental tests to be safe. However, the Department assumes no responsibility for any damage sustained through or in the course of such treatment.

. . . .

§ 319.56-2x Administrative instructions; conditions governing the entry of certain fruits and vegetables for which treatment is required.

(a) The following fruits and vegetables may be imported into the United States only if they have been treated in accordance with the Plant Protection

and Quarantine Treatment Manual, which is incorporated by reference at § 300.1 of this chapter:

<i>Country/locality</i>	<i>Common name</i>	<i>Botanical name</i>	<i>Plant part(s)</i>
.... Mexico	Cherry	<i>Prunus avium</i>	fruit.
 Mango	<i>Mangerifa indica</i>	fruit.
....			

§ 319.56-3 Applications for permits for importation of fruits and vegetables.

(a) Persons contemplating the importation of fruits or vegetables the entry of which is authorized in the regulations in this subpart shall first make application to the Plant Protection and Quarantine Programs for a permit, stating in the application the country or locality of origin of the fruits or vegetables, the port of first arrival, and the name and address of the importer in the United States to whom the permit should be sent.

(b) Applications for permits should be made in advance of the proposed shipments; but if, through no fault of the importer, a shipment should arrive before a permit is received, the importation will be held in customs custody at the port of first arrival, at the risk and expense of the importer, for a period not exceeding 20 days pending the receipt of the permit.

(c) Application may be made by telegraph, in which case the information required above must be given.

(d) A separate permit must be secured for shipments from each country and for each port of first arrival in the United States.

7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, .56-3.

**ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the

Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual whose mailing address is 485 Otis Drive, Brownsville, Tennessee 38012.

2. On or about May 20, 2000, Respondent imported approximately 36 fresh mangoes from Mexico into the United States at Dallas, Texas, without a permit and without having the fresh mangoes treated.

3. On or about May 20, 2000, Respondent imported approximately 2 pounds of fresh cherries from Mexico into the United States at Dallas, Texas, without a permit and without having the fresh cherries treated.

4. On or about May 20, 2000, Respondent imported one fresh sweet lime from Mexico into the United States at Dallas, Texas.

Conclusion of Law

By reason of the Findings of Facts, Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 319.56(c), .56-2i, .56-2x, and .56-3.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in her letter dated September 18, 2001 [hereinafter Appeal Petition]. First, Respondent asserts she previously paid \$50 in relation to this proceeding (Appeal Pet. at first unnumbered page). Complainant responds that the Animal and Plant Health Inspection Service has received \$50 from Respondent and that Respondent's \$50 payment should be credited against the \$500 civil penalty assessed against Respondent by the ALJ (Complainant's Response to Respondent's Appeal at 2; Attachment to Complainant's Response to Respondent's Appeal).

Based on Respondent's assertion that she previously paid \$50 in relation to this proceeding and Complainant's agreement with Respondent's assertion, I reflect Respondent's previous payment of \$50 in the Order.

Second, Respondent requests that she be allowed to pay the civil penalty assessed against her in installments. Respondent does not indicate either a number of installments or a time between each installment. (Appeal Pet. at first unnumbered page.) Complainant has no objection to Respondent's paying the civil penalty in installments of \$50 per month (Complainant's Response to Respondent's Appeal at 2).

Pursuant to Respondent's request that she be allowed to pay the civil penalty in

installments and Complainant's lack of objection to Respondent's paying the civil penalty in installments of \$50 per month, I issue an Order requiring Respondent to pay the civil penalty in installments of \$50 per month.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent is assessed a \$500 civil penalty. The civil penalty shall be paid by certified checks or money orders, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent has paid \$50 of the \$500 civil penalty which I assess against her. Respondent shall pay the unpaid portion of the \$500 civil penalty in installments of \$50 each month for 9 consecutive months. Respondent's next payment shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. If Respondent is late in making any payment or misses any payment, then all remaining payments become immediately due and payable in full. Respondent shall state on each certified check or money order that payment is in reference to P.Q. Docket No. 01-0017.
